No. 82-1653

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES MITCHELL NEWMAN, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ROGER M. OLSEN
Deputy Assistant Attorney General

DAVID A. STRAUSS
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ROSALIND C. COHEN
Assistant General Counsel

ELLIOT M. PINTA
Attorney

Securities and Exchange Commission
Washington, D.C. 20549

QUESTIONS PRESENTED

Petitioner participated in a scheme in which employees of investment banking firms misappropriated confidential information concerning proposed mergers and acquisitions from the firms and their clients, secretly bought securities of the target companies on the basis of that material, nonpublic information, and subsequently sold those securities at a profit after the information had become public.

The questions presented are:

1. Whether petitioner's conviction for mail fraud should be reversed on the ground that the government did not show additional, tangible pecuniary damage to the firms or their clients.

2. Whether the scheme violated the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases—Continued:

Page

Cases—Continued:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1653

JAMES MITCHELL NEWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction (Pet. App. 1a-3a) is unreported. The previous opinion of the court of appeals, reversing the dismissal of the indictment (Pet. App. 40a-54a), is reported at 664 F.2d 12. The opinion of the district court dismissing the indictment (Pet. App. 4a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1983. The petition for a writ of certiorari was filed on April 8, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a securities trader. Two of his accomplices—E. Jacques Courtois and Adrian Antoniu—were employed by the investment banking firms Morgan, Stanley & Co., Inc., and Kuhn Loeb & Co. The clients of those

firms entrusted the firms with confidential information concerning prospective mergers, acquisitions, and tender offers.[1] From 1973 through 1978, Courtois and Antoniu misappropriated such information from their firms and surreptitiously relayed it to petitioner, who purchased securities on the basis of it. Two European residents, Franklin Carniol and Constantine Spyropoulos, were also part of the scheme. Following the announcement of the takeover plans, petitioner sold the securities at substantial profit and divided the gains with his accomplices. Pet. App. 41a-42a.

Petitioner and his accomplices adopted elaborate strategems to avoid being detected. The group made their purchases by cash or through secret foreign bank and trust accounts in order to avoid identification by brokerage or stock exchange records. They also used aliases when leaving telephone messages for each other at work, and they changed bank and trust accounts and spread their purchases among several brokers to avoid detection. Pet. App. 42a; J.A. 232, 239-241, 258-259, 275-279.[2]

Petitioner, Courtois, Carniol, and Spyropoulos were indicted in the United States District Court for the Southern District of New York on charges of mail fraud, in violation of 18 U.S.C. 1341; securities fraud, in violation of

---

[1]An investment banker is often retained in an advisory capacity by a corporation contemplating a tender offer or other form of acquisition. See M. Lipton & E. Steinberger, *Takeovers & Freezeouts* para. 1.4.2 (1978). Because of the sensitive (and often tentative) nature of the initial planning stage of a tender offer, the communications between an investment banker and its clients are highly confidential and the ability of an investment banker to protect clients' confidences is an important business asset. Particularly in the case of a proposed tender offer, the premature disclosure of that information or unusual market activity as a result of disclosure can adversely affect the ability of the client corporation to consummate the takeover at a favorable price. *Id.* at para. 1.6.

[2]"J.A." refers to the joint appendix filed in the court of appeals.

Sections 10(b) and 32 of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and 78ff, and Rule 10b-5, 17 C.F.R. 240.10b-5; and conspiracy to commit those offenses, in violation of 18 U.S.C. 371.[3] The indictment specifically alleged that petitioner and his accomplices agreed that the investment bank employees "would misappropriate confidential, material information concerning mergers and acquisitions and the companies involved in merger and acquisition discussions and negotiations, which information was entrusted to [the investment banking firms] by [their] clients" (Pet. App. 59a, 60a).

In this way, the indictment stated, petitioner and his accomplices breached and aided and abetted the "breach [of] the trust and confidence placed in [the investment banking firms] by [their] clients and the trust and confidence placed in" the firms' employees by the firms, the firms' clients and the clients' shareholders (Pet. App. 60a). The indictment further alleged that petitioner and his co-conspirators "affirmatively misled [the investment banking firms] by, among other things, falsely and fraudulently promising to honor their fiduciary duties to maintain the confidentiality of [the] information provided to them in trust"; that they "falsely and fraudulently conceal[ed] the

---

[3]Courtois, Carniol, and Spyropoulos are fugitives. Pet. App. 5a n.1. Antoniu pleaded guilty to a separate information and testified for the government against petitioner.

Petitioner suggests (Pet. 6 n.6) that the government acted improperly in not proceeding against Bruce Steinberg, a client of petitioner who also traded on the basis of the misappropriated information. But Steinberg's role in the scheme was wholly different from petitioner's. In contrast to petitioner, who engineered the fraud, Steinberg was not told of the source of petitioner's information and knew nothing of its fraudulent origin until the end of the scheme. See J.A. 440-461. The government accordingly promised Steinberg immunity at an early stage in the investigation (see J.A. 642-643) because it would otherwise have been unable to pursue the investigation of persons whom it believed to be more culpable.

violation of their fiduciary duties, by failing to report the * * * trading to their employers as required"; and that they "falsely and fraudulently assert[ed] that they maintained no direct or indirect interest in securities trading accounts." *Id.* at 60a-61a.

2. The district court dismissed the indictment. It held that the mail fraud counts could not stand because they were "unaccompanied by allegations or proof of direct, tangible, economic loss" to "the investment banks or their clients" (Pet. App. 37a). The district court further ruled that the interpretation of the securities laws was so unsettled that petitioner could not have had adequate notice that the conduct with which he was charged was illegal under those statutes (*id.* at 25a).

The government appealed the dismissal of the indictment, and the court of appeals reversed. In reinstating the mail fraud charges, the court of appeals held that the allegations of "fraudulent misappropriation of an employer's secret information" and of specific fraudulent acts and assertions by Courtois and Antoniu stated a violation of the mail fraud statute without an additional allegation of direct, tangible, economic loss to the victims of the fraud. Pet. App. 50a-51a. The court also ruled that, in any event, the mail fraud counts adequately alleged direct economic harm, noting that petitioner "could not have been unaware that confidential information, such as that involved here, has a 'negative' value which is diminished when confidentiality is lost." *Id.* at 52a.

The court of appeals also reinstated the securities fraud counts, reasoning (Pet. App. 47a; citations omitted):[4]

[4]Senior District Judge Dumbauld, sitting by designation, described petitioner's actions as "reprehensible" and concurred in the court's decision on the mail fraud count, but he said that he was "not certain" that petitioner could be charged with securities fraud because the decisions of this Court "seem[ed] to evince a trend to confine the scope of §10(b) to practices harmful to participants in actual purchase-sale transactions." Pet. App. 53a.

> Had [petitioner] used similar deceptive practices to mulct Morgan Stanley and Kuhn Loeb of cash or securities, it could hardly be argued that those companies had not been defrauded. By sullying the reputations of Courtois' and Antoniu's employers as safe repositories of client confidences, [petitioner] and his cohorts defrauded those employers as surely as if they took their money.
>
> [Petitioner] and cohorts also wronged Morgan Stanley's and Kuhn Loeb's clients, whose takeover plans were keyed to target company stock prices fixed by market forces, not artificially inflated through purchases by purloiners of confidential information.

The court also noted that "since [petitioner's] sole purpose in participating in the misappropriation of confidential takeover information was to purchase shares of the target companies, we find little merit in his disavowal of a connection between the fraud and the purchase" (Pet. App. 48a).

On remand, petitioner was convicted on seven counts of mail fraud, seven counts of securities fraud, and one count of conspiracy. He received concurrent prison sentences of one year and one day on the conspiracy charge, on six mail fraud counts, and on six securities fraud counts. He was also sentenced to concurrent three year terms of probation on the other mail fraud and securities fraud counts and fined $10,000 on the conspiracy charge. J.A. 32. The court of appeals affirmed in a brief opinion. Pet. App. 1a-3a.

ARGUMENT

1. Petitioner's principal contention (Pet. 8-12) is that his mail fraud conviction must be reversed because the government did not show that the victims of his fraud suffered "actual or contemplated pecuniary injury" or "economic injury" (*id.* at 8). Petitioner does not explain what he means

by these terms, and the meaning of his contention is therefore somewhat difficult to discern. The district court specifically charged the jury that "a breach of fiduciary duty standing alone does not constitute a fraud under [the mail fraud] statute. To bring the breach of a fiduciary duty within the mail fraud statute the government must prove that some actual harm or injury was at least contemplated." Pet. App. 122a. Thus petitioner cannot claim that the government failed to prove that his fraud inflicted "actual or contemplated" injury on its victims.

Instead, petitioner's objection—although he does not say so explicitly—must be to the portion of the jury instructions that explained the kinds of economic harm or injury that would satisfy the statute. On this issue, the district court charged (Pet. App. 123a-124a):

> It is sufficient for the government to prove that, in the circumstances of the case, the scheme carried within it the potential of causing harm to others and the participants in the scheme were aware of that potential.
>
> In addition, it is not necessary in a mail fraud case based upon a breach of fiduciary duty by a private employee for the government to prove direct, tangible, economic loss to the victim, actual or contemplated. The object of a fraudulent scheme need not be the deprivation of a tangible interest, such as money, from another. Schemes designed to deprive [their] victims of intangible rights also violate the mail fraud statute.
>
> For the purposes of this case, I charge you that any employer, including investment banks, has the right to its employees' honest services and to have its business conducted honestly. An investment bank has the right to expect that its employees will not divulge information entrusted to its employees by clients in confidence.

> An investment bank has an interest in preserving its reputation for being able to preserve confidential information. The clients of an investment bank have the right to expect that their confidences will be respected and protected. And confidential information itself has a negative value which may be diminished when confidentiality is lost. A scheme which is intended to deprive another of these intangible rights or interests can constitute a scheme to defraud under the mail statute.

Accordingly, petitioner's assertion must be that the government must show tangible, quantifiable economic harm in order to obtain a mail fraud conviction.

This contention is wholly without merit. Nothing in the language of the mail fraud statute, 18 U.S.C. 1341, limits its coverage to fraud that inflicts tangible injury. On the contrary, the statute broadly applies to "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * *." This language obviously reaches the conduct of which petitioner was convicted.

Moreover, petitioner fails to cite a single case interpreting Section 1341 that adopts his view of the statute.[5] Petitioner

---

[5]Petitioner quotes (Pet. 8) a phrase—"should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose"—from *Hammerschmidt* v. *United States*, 265 U.S. 182, 188-189 (1924). But that phrase referred not to the mail fraud statute itself but to a lower court decision applying that statute to an act of blackmail—an act that, unlike petitioner's, is not obviously "a[] scheme or artifice to *defraud*" (emphasis added). In fact, the *Hammerschmidt* Court approved the application of federal fraud statutes to "the deprivation of something of value by trick, deceit, chicane or overreaching * * * wronging one in his property rights by dishonest methods or schemes" (*id.* at 188)—terms that do not exclude intangible things of value or intangible "property rights," and that clearly describe what petitioner and his co-conspirators did to the investment banks and their clients.

acknowledges that courts have upheld mail fraud convictions even where the jury found only a breach of a fiduciary duty by the defendant without finding some additional quantifiable pecuniary harm, in cases involving both public officials (Pet. 10 n.11) and private employees (*id.* at 11 n.13). In fact, the courts of appeals have repeatedly upheld the application of the mail fraud statute to breaches of fiduciary duty like that aided and abetted by petitioner.[6] Petitioner's principal reliance (*id.* at 10-11) is on the Second Circuit's own decision in *United States* v. *Dixon*, 536 F.2d 1388 (1976). But *Dixon* specifically approved the application of the mail fraud statute to a "scheme contemplating pecuniary loss to someone *or* direct pecuniary gain to those who designed [the scheme]" (*id.* at 1399 (emphasis added); see *id.* at 1400) and to "a scheme to use a private fiduciary position to obtain direct pecuniary gain" (*id.* at 1399).

---

[6]See, *e.g.*, *United States* v. *Greenleaf*, 692 F.2d 182, 188 (1st Cir. 1982), cert. denied, No. 82-1225 (Apr. 4, 1983); *United States* v. *Boffa*, 688 F.2d 919, 925-926 (3d Cir. 1982), cert. denied, No. 82-814 (Mar. 7, 1983); *United States* v. *Margiotta*, 688 F.2d 108, 121 (2d Cir. 1982), cert. denied, No. 82-1126 (May 2, 1983); *United States* v. *Barber*, 668 F.2d 778, 784 n.4 (4th Cir. 1982), cert. denied, No. 81-2166 (Oct. 4, 1982); *United States* v. *Bronston*, 658 F.2d 920, 926-928 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States* v. *Barta*, 635 F.2d 999, 1005-1007 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bohonus*, 628 F.2d 1167, 1170-1173 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *Mandel*, 591 F.2d 1347, 1361-1364, vacated on other grounds, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *Bush*, 522 F.2d 641, 646-648 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *United States* v. *Bryza*, 522 F.2d 414, 421-423 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *Isaacs*, 493 F.2d 1124, 1149-1150 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *States*, 488 F.2d 761, 764-766 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974); *United States* v. *George*, 477 F.2d 508, 512-514 (7th Cir.), cert. denied, 414 U.S. 827 (1973). See also *United States* v. *Buckley*, 689 F.2d 893, 897-898 (9th Cir. 1982); *United States* v. *Drury*, 687 F.2d 63, 65 (5th Cir. 1982), petition for cert. pending, No. 82-1395; *United States* v. *Pintar*, 630 F.2d 1270, 1279-1280 (8th Cir. 1980).

2. a. Petitioner's sentences on the securities fraud counts are concurrent with his sentences on the mail fraud counts.[7] For that reason alone, the contentions he makes on the securities fraud issues do not warrant this Court's review. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976).

b. In any event, the claims petitioner makes with respect to his securities fraud convictions are without merit. Section 10(b) and Rule 10b-5 prohibit fraud in connection with the purchase or sale of securities. 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5. The Court has consistently construed this prohibition broadly. See, *e.g.*, *Herman & MacLean* v. *Huddleston*, No. 81-680 (Jan. 24, 1983), slip op. 10-11 (Section 10(b) should be construed so as to effectuate its "broad proscription against fraud"); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972) ("These proscriptions, by statute and rule, are broad and, by repeated use of the word 'any,' are obviously meant to be inclusive."); *United States* v. *Naftalin*, 441 U.S. 768, 773, 775-777 (1979).

As the court of appeals explained (Pet. App. 46a-47a), petitioner's conduct was plainly fraudulent. "In other areas of the law, deceitful misappropriation of confidential information by a fiduciary, whether described as theft, conversion, or breach of trust, ha[s] consistently been held to be

---

[7] In addition to his concurrent terms of imprisonment and probation, petitioner was also fined on the conspiracy charge. The conspiracy count charged both conspiracy to commit mail fraud and conspiracy to commit securities fraud. Pet. App. 58a-59a. But the mail fraud, securities fraud, and conspiracy charges were all based on the same "scheme and artifice." See *id.* at 73a, 78a. Thus the jury, in determining that petitioner was guilty of both conspiracy and mail fraud, necessarily found that petitioner engaged in a conspiracy to carry out a scheme that violated the mail fraud statute. For this reason, even if petitioner's securities fraud convictions were reversed, he would not be entitled to relief from his conspiracy conviction.

unlawful." *Id.* at 47a (citations omitted).[8] See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203 (1976) (brackets omitted) (Section 10(b) is "a 'catchall' clause to enable the Commission 'to deal with new manipulative or cunning devices' "). Indeed, petitioner does not appear seriously to deny the fraudulent character of his enterprise. He does not deny that he and his confederates misappropriated—"stole to put it bluntly" (*Chiarella* v. *United States*, 445 U.S. 222, 245 (1980) (Burger, C.J., dissenting))—confidential information in breach of a clear fiduciary duty owed to the investment banking firms and their clients. This Court's recent opinion in *Dirks* v. *SEC*, No. 82-276 (July 1, 1983), explicitly recognized the existence of this duty (slip op. 8 n.14)[9] and implicitly recognized that liability could be imposed for "misappropriat[ing] * * * information" (slip

---

[8]In *Chiarella* v. *United States*, 445 U.S. 222 (1980), several Justices agreed that trading on misappropriated information would violate Section 10(b), even though the Court held (445 U.S. at 235-237) that that question was not presented in the case. See *id.* at 239 (Brennan, J., concurring); *id.* at 239-243 (Burger, C.J., dissenting); *id.* at 245 (Blackmun, J., dissenting). In other contexts, this Court has found similar breaches of a fiduciary duty to be fraudulent. See, *e.g.*, *United States* v. *Carter*, 217 U.S. 286, 305-310 (1910); *Wardell* v. *Railroad Co.*, 103 U.S. 651, 654-659 (1880).

[9]See also *Dirks* v. *SEC*, *supra*, slip op. 12, quoting *Mosser* v. *Darrow*, 341 U.S. 267, 272 (1951) ("[T]he transactions of those who knowingly participate with the fiduciary in such a breach are 'as forbidden' as transactions 'on behalf of the [fiduciary] himself.' ").

The contrast with *Walton* v. *Morgan Stanley & Co.* 623 F.2d 796 (2d Cir. 1980), cited by petitioner (Pet. 20) and discussed by the Court in *Dirks* (slip op. 15 n.22), is instructive. In *Walton*, an investment banking firm received nonpublic information from a *non*-client—a possible target of a takeover by one of its clients. The firm then traded on that information after its client had *abandoned* its takeover plans. By contrast, petitioner traded on information misappropriated from both the investment banking firm and its clients at a time when the clients had a very substantial interest in preserving its confidentiality. (We note that *Walton* was decided under Delaware state law. 623 F.2d at 798.)

op. 18). Petitioner's misappropriation and its fraudulent character were fully alleged in the indictment.

Petitioner asserts (Pet. 13-21) that his conduct did not violate Section 10(b) and Rule 10b-5 because he and his accomplices defrauded only the investment banks and their clients and not any person with whom they engaged in securities transactions. In this connection, petitioner alludes to the principle (see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975)) that a civil damages action under Section 10(b) may be brought only by a purchaser or seller of securities. Pet. 18 n.24. But as the Court has expressly held, this limitation has no application to a government enforcement action. See, *e.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, 421 U.S. at 751 n.14; *United States* v. *Naftalin*, *supra*, 442 U.S. at 774 n.6.

Petitioner's fraud plainly occurred—to quote the language of the statute and the rule—"*in connection with* the purchase and sale of securities" (emphasis added). First, the misappropriated information concerned the investment banks' clients' proposed purchases of securities. Second, as the court of appeals pointed out (Pet. App. 47a), petitioner and his co-conspirators wronged those clients with respect to the client's purchases of securities. Third, the conspirators misappropriated the information for the "sole purpose" of "purchas[ing] shares of the target companies" (*id.* at 48a). See *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13 (1971) (emphasis added) (Section 10(b) reaches "deceptive practices *touching* [the] sale of securities as an investor"); *United States* v. *Naftalin*, *supra*, 441 U.S. at 772 ("The statutory language does not require that the victim of the fraud be an investor."). See also *id.* at 776 ("the welfare of investors and financial intermediaries are inextricably linked—frauds perpetrated upon

either business or investors can redound to the detriment of the other and to the economy as a whole").[10]

Petitioner avoids discussing the language of the statute or the rule. Instead, he relies almost exclusively (see Pet. 15-17) on *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977). But the crux of the holding in *Santa Fe Industries* is that mere unfairness in a securities transaction, "without any deception, misrepresentation, or nondisclosure," does not violate Section 10(b) and Rule 10b-5. 430 U.S. at 476. Petitioner was specifically charged with, and convicted of, deception, misrepresentation, and nondisclosure. See pages 3-4, *supra*. As this Court recently said in discussing *Santa Fe Industries*, "[i]n an inside-trading case * * * fraud [in violation of Rule 10b-5] derives from the 'inherent unfairness involved where one takes advantage' " — as petitioner plainly did — "of 'information intended to be available only for a corporate purpose and not for the personal benefit of anyone.' " *Dirks* v. *SEC, supra*, slip op. 7 (citation omitted).[11] Contrary to petitioner's suggestion, *Santa Fe Industries* does not give courts a license to decide that certain conduct, although covered by the express terms of Section 10(b) and Rule 10b-5, is better left to state regulation.

Petitioner also urges (Pet. 19) that the court of appeals' ruling may have an adverse impact on securities analysts whose business it is to seek out and piece together information not widely disseminated in the market. But the line

---

[10]*Naftalin* concerned Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), but as petitioner appears to acknowledge (see Pet. 18 n.24), the differences between Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 (see generally *Aaron* v. *SEC*, 446 U.S. 680, 687-702 (1980)) are not material to this discussion.

[11]The Court also firmly stated in *Dirks* that Rule 10b-5 does not distinguish between "inside" information and "market" information like that on which petitioner traded. Slip op. 10 n.15.

between such legitimate activities and the misappropriation of information of which petitioner was guilty is scarcely hard to discern. As the district court instructed the jury in this case: "To misappropriate means to take and use something without the authority of the rightful owner. It is the equivalent of steal" (Pet. App. 117a). Moreover, scienter is an element of a violation of Section 10(b). *Aaron* v. *SEC*, 446 U.S. 680, 695 (1980). The legitimate use of information will, therefore, not be chilled by the prosecution of practices like those of petitioner and his confederates.

c. Finally, this is not an appropriate case in which to decide the question petitioner urges on the Court. Pursuant to its rulemaking authority under Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), the SEC has recently promulgated Rule 14e-3(a), 17 C.F.R. 240.14e-3(a), which prohibits persons other than the bidder from trading on material nonpublic information concerning a planned tender offer where that information has been acquired from the bidder or a person associated with the bidder. Future litigation over conduct like petitioner's will, therefore, focus not only on Section 10(b) but also on the Commission's authority under Section 14(e) and this more specific rule. See *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 468 (1969) (Sections 10(b) and 14(e) are not coextensive).

3. Petitioner further contends (Pet. 21-25) that he did not have fair notice that his conduct violated the securities laws. But as the court of appeals explained, petitioner and his co-conspirators could have had no possible doubt that their conduct was fraudulent. See Pet. App. 47a (citing cases) ("deceitful misappropriation of confidential information by

a fiduciary * * * had consistently been held to be unlawful"). See also pages 9-10, *supra.*[12] Petitioner does not contend that he actually thought his conduct was legal, and the elaborate measures he and his co-conspirators took to conceal their enterprise make it clear that they knew their conduct was illegal. In addition, at the time petitioner and his confederates were engaging in their scheme, the SEC had brought a number of enforcement actions against persons who had engaged in similar conduct;[13] in fact, the evidence at trial showed that in 1974, one of the conspirators brought to petitioner's attention a newspaper account of a Commission enforcement action against persons who had engaged in similar conduct. Petitioner's reaction was to say that the account showed that he and his co-conspirators

---

[12]See also *Superintendent of Insurance* v. *Bankers Life & Casualty Co., supra*, 404 U.S. at 11 n.7 ("misappropriation is a 'garden variety' type of fraud").

[13]See, *e.g.*, *SEC* v. *Sorg Printing Co.*, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 94,767 (S.D.N.Y. Aug. 21, 1974) (consent decree) (financial printer engaged by bidder company and several of the printer's employees purchased stock in target company prior to public announcement of tender offer); *SEC* v. *Healy*, No. 74-4305 (S.D.N.Y. Nov. 18, 1974) (consent decree) (employees of bidder company purchased target company securities before the tender offer was announced); *SEC* v. *Primar Typographers, Inc.*, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 95,734 (S.D.N.Y. Sept. 16, 1976) (consent decree) (employees of financial printer engaged by bidder company obtained, during the course of their employment, information regarding pending tender offers and, on that basis, purchased target company stock prior to announcement of tender offer); *SEC* v. *Stone*, No. 78-4259 (S.D.N.Y. Sept. 11, 1978) (consent decree) (officer of subsidiary of bidder company purchased shares in target company prior to announcement of proposed acquisition).

Consent decrees are a means of giving notice to the securities industry of the kind of practices considered unlawful. See generally *Arthur Lipper Corp.* v. *SEC*, 547 F.2d 171, 181 n.7 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978).

were unlikely to be severely punished. J.A. 233-238. In these circumstances, the fact that this Court has not yet squarely held that petitioner's conduct violated Section 10(b) and Rule 10b-5 did not constitute a lack of fair notice; if it did, no defendant could ever be prosecuted under a statute the interpretation of which has not been definitively settled by this Court. See *United States* v. *Feola*, 420 U.S. 621, 685 (1975) (an "interpretation [of a statute] poses no risk of unfairness to defendants [and] * * * is no snare for the unsuspecting" when "the perpetrator * * * knows from the very outset that his planned course of conduct is wrongful [and] * * * unlawful").[14]

[14]Similar claims of lack of fair notice in Section 10(b) prosecutions have consistently been rejected where, as here, the conduct in question was plainly fraudulent. See, *e.g.*, *United States* v. *Brown*, 555 F.2d 336, 339-340 (2d Cir. 1977); *United States* v. *Persky*, 520 F.2d 283, 286-288 (2d Cir. 1975). See also *United States* v. *Naftalin, supra*, 441 U.S. at 778-779; *SEC* v. *Shapiro*, 494 F.2d 1301, 1308 (2d Cir. 1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ROGER M. OLSEN
Deputy Assistant Attorney General

DAVID A. STRAUSS
Assistant to the Solicitor General

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ROSALIND C. COHEN
Assistant General Counsel

ELLIOT M. PINTA
Attorney
Securities and Exchange Commission

JULY 1983

DOJ-1983-07